No. 78-216

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY OF PETITIONER

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REPLY OF PETITIONER

The United States Independent Telephone Association (USITA), Petitioner in No. 78-216,[1] hereby respectfully submits its reply to the September 26, 1978 Briefs in Opposition filed by MCI Telecommunications Corporation, *et al.*, (MCI) and by Southern Pacific Communications Company (SPCC).

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[1] As noted in our petition, USITA, as the national trade association of the Nation's approximately 1,600 Independent (non-Bell) telephone companies, appears here in the interest of these companies in the furnishing of local and long distance telephone service.

I. PRELIMINARY STATEMENT AND SUMMARY.

While these briefs ignore the substantial interest of USITA and its members in this case—perhaps understandably in view of the presence here of a larger target (AT&T)—of far greater decisional significance is that neither brief comes to grips with the basic and critical fact that there are now at least two new long distance telephone companies in these United States (MCI and SPCC) not because the Federal Communications Commission (FCC) found that telephone service was so inadequate or that telephone rates were so high that the public interest required new, additional, or better long distance telephone service, but simply because the court below ordered it.

As MCI's recent full page advertisement (*Industry Week,* September 18, 1978, p. 128) tells the story—

> "Decision of the Federal Government allows MCI to offer low cost long distance telephone service . . . . Long distance calls cost less when you use MCI with Bell . . . we're part of the telephone system."

Although MCI's advertisement does not specify which branch of the Federal Government made the decision, if one thing is clear in this case, it is the fact that it is the court below—not FCC—that has decided that MCI should be allowed to offer telephone service. And it is the court below—not FCC—that has found MCI to be "part of the telephone system", by requiring existing telephone companies (Bell and Independent) to connect their local exchanges to MCI and other "specialized carrier" facilities in order that long distance customers of the existing companies may become customers of MCI or SPCC for long distance telephone

service. In so doing, the court below has far overstepped the bounds of judicial review and improperly intruded into the agency's decision making process.[2]

II. THE FCC HAS NOT ALLOWED MCI TO OFFER LONG DISTANCE TELEPHONE SERVICE.

The FCC orders in this case below, its petition to the Court in *Execunet I,* its pending petition (No. 78-270), and its consistent public utterances since its original *MCI* decision in 1968[3] make it clear beyond any doubt that although FCC intended to and believed it had authorized specialized carriers to provide new and innovative communications services, FCC did not and has not found competition in the offering of plain old long distance telephone service required by or in the public interest. And as recently as 1974, even MCI agreed with FCC. In MCI's own words:

> "Specialized carriers are *not* authorized to furnish the equivalent [of] ordinary long distance telephone service, and to the best of our knowledge this is the first time anyone has alleged that they are . . . . They proposed, and have been authorized, to provide the full range of *private line* service. They have never proposed—and have not applied for the facilities required for—the provision of long distance service, which involves the ability to reach every other telephone in the system" (MCI Motion to Strike, May 15, 1974, in *Washing-*

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[2] *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council,* 98 S.Ct. 1197 (1978).

[3] See, *e.g.,* Statement of Chairman Wiley, House Hearings, 94th Cong., 1st Sess., 46 (March 11, 1975); First Report, FCC Docket No. 20003, p. 8 (September 27, 1976). In each instance it was specifically stated that the Commission had not authorized competition in the long distance telephone service market.

ton Utilities & Transportation Commission v. *F.C.C.*, 513 F.2d 1142 (9th Cir. 1974)).

Four years ago, then, and three years after the FCC's *Specialized Carrier* decision,[4] both the FCC and MCI understood and agreed on the limited scope of specialized carriers authorizations. A logical question, then, is whether the specialized carriers or the FCC have taken any action since 1974 which would destroy this unanimity of opinion. The short answer is no.

Four FCC decisions are pertinent. First, there is *Bell System Tariff Offerings,*[5] an administrative proceeding which culminated in the much cited *Bell Telephone Company of Pennsylvania* v. *F.C.C.*[6] The *Bell of Pennsylvania* decision, affirming the FCC finding that interconnection for *all private line services* was required, must be read together with the Third Circuit's disposition of the interconnection issue when that issue was initially brought before it by MCI some five months earlier. There the Third Circuit expressly and properly deferred to FCC the determination of "the issue of what private line services have been authorized" and of "the scope of permissible competition between the specialized carriers, such as MCI, and the existing carriers, such as AT&T."[7] *Bell System Tariff Offerings, supra,* was the FCC's answer to the Third Circuit's questions.

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[4] *Specialized Common Carriers,* 29 F.C.C. 2d 870 (1971); *recon. den.*, 31 F.C.C. 2d 1106 (1971).

[5] 46 F.C.C. 2d 413 (1974).

[6] 503 F.2d 1250 (3d Cir. 1974), *cert. den.*, 422 U.S. 1026 (1975).

[7] *MCI Telecommunications Corp.* v. *AT&T,* 496 F.2d 214, 222 (3d Cir. 1974).

Next are the 1975 and 1976 decisions of the FCC rejecting the MCI Execunet tariffs as beyond the scope of MCI's authorizations.[8] Finally, there is the FCC's February 3, 1978 response to a request for declaratory ruling as to the scope of a telephone company's obligation to offer its local exchanges and its long distance telephone service customers to MCI and other specialized carriers.[9]

The February, 1978 FCC action, wholly consistent with the Commission's series of rulings on specialized carriers since 1968 and responsive to the decisions of the Third Circuit on telephone company interconnection obligations, *supra,* emphasized that FCC had held no hearings on the issue of competition in the provision of ordinary long distance telephone service or on interconnection between telephone companies and specialized carriers for provision of long distance telephone service. Necessarily, then, the FCC could not and it did not make the statutorily required findings that the public interest requires competition in the provision of long distance telephone service, or that it would be in the public interest to require telephone companies to provide their facilities and their customers in furtherance of that competition.

From these events, the conclusion is inescapable that there has been no FCC action since 1974 which even arguably could be construed as authorizing, in the public interest, specialized carrier entry into the long dis-

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[8] *MCI Telecommunications Corp.*, 60 F.C.C. 2d 62 (1975), 60 F.C.C. 2d 25 (1976).

[9] *In the Matter of Petition of AT&T,* Memorandum, Opinion and Order, F.C.C. 78-142, Pet. App. C.

tance telephone service field, or requiring, in the public interest, interconnection by telephone companies of their local exchanges with specialized carriers for that service.

Similarly, there has been no request by MCI (or any other specialized carrier) for authorization to enter the long distance telephone service market or for interconnections to provide that service. What was done, however, was the filing of a vague and ambiguous tariff by MCI, later named "Execunet", which produced the 1975 and 1976 FCC decisions rejecting the tariff as beyond the scope of MCI's authorizations. Thus without FCC authorization or request for authorization, two new long distance telephone companies (MCI and SPCC) have in fact come into being.

III. THE "DECISION OF THE FEDERAL GOVERNMENT" WAS BY THE COURT BELOW.

With FCC not only not affirmatively authorizing competition or requiring interconnection, necessarily the reason for the existence now of competing long distance telephone companies must be found in the decisions of the court below. To begin, the lower court, in its result oriented opinion in *Execunet I*,[10] ingeniously concluded that FCC had erred in believing that it could grant authorizations "as applied for." On the contrary, the court said below, FCC must also establish a record to support an affirmative conclusion that authority not applied for should not be granted.[11]

[10] 561 F.2d 365.

[11] The drastic change from the Commission's standard "as applied for" procedure to this new judicially prescribed regulatory scheme is acknowledged in the Commission's post-*Execunet* orders. (See USITA Petition (No. 78-216), Attachment, p. 2a., note).

When FCC instituted a proceeding to establish that record, and, on the same day twice acknowledged that it had no record on which to base an affirmative finding that long distance telephone service competition and interconnection would be in the public interest, the court below reacted not judicially, but rather emotionally, to what it apparently perceived as an affront to its judicial dignity. In *Execunet II*,[12] the court below concluded that it had not merely remanded a Commission error for correction by the Commission, but that it (the court) had affirmatively commanded entry into the long distance telephone service market by MCI and had affirmatively required telephone company interconnection with MCI and other specialized carriers.

Thus, contrary to the arguments presented to the Court in opposition to the petitions for certiorari in *Execunet I* that all the court below had done was discover a procedural error and remand the case to the FCC for correction of that error,[13] the court below has

[12] Pet. App. A.

[13] See, *e.g.*, SPCC Brief in Opposition, Nos. 77-420 *et al.*, where at pp. 10-11 the argument reads:

> "The ultimate issue remaining for decision by the Commission is one which it has never properly considered and resolved, viz., how much *further* does and should competition in communications services extend. The decision of the Court of Appeals below has not resolved this issue. *It has made no ruling on the lawfulness of Execunet*, or of the AT&T monopoly in MTS services, or on the proper dividing line, if any, which may be drawn between MTS and private line services, or between authorized and non-authorized services. All these matters are left for the Commission to decide. Indeed, the Court of Appeals has expressly noted: (footnote omitted)
>
> > In so holding we have not had to consider, and have not considered, whether competition like that posed by Execunet is in the public interest. That will be the question for the Commission to decide should it elect to continue these proceedings (Emphasis supplied)."

now interpreted its *Execunet I* decision as follows:

> ". . . MCI has met with almost continuous resistance from AT&T in its efforts to provide communications services. *We had thought that this process finally culminated in our Execunet decision upholding MCI's authority to offer Execunet* pending further rulemaking by the Commission." (Emphasis supplied).[14]

In *Execunet II* the court below also concluded that:

> ". . . our analysis and decision of the *Execunet* case is plainly inconsistent with the analysis and ruling of the Commission on February 23, 1978 holding AT&T under 'no obligation' to provide interconnections for Execunet." (*Slip Op.*, p. 12; Pet. App. 11a).

Additionally, in holding that AT&T's interconnection obligations were as expansive as the court-ordered unlimited MCI authorizations, *Execunet II* iterated and reiterated the *Execunet I* direction to the FCC that only by tariff or rulemaking proceedings could the Commission undertake to limit MCI's right to enter the long distance telephone market and compete with AT&T.[15]

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[14] *Slip Op.*, p. 3, Pet. App. 3a. See also the court's comments "Having successfully litigated the question of its right to provide Execunet service . . ." (*Slip Op.*, p. 10, Pet. App. 10a); "For in *Execunet* we held that MCI's facilities authorization encompassed Execunet service . . ." (*Slip Op.*, p .14, Pet. App. 13a); and see also the court's *per curiam* memorandum holding, in effect, that until the Commission has completed its broad rulemaking proceeding and determined whether competition in the long distance telephone service market is or is not in the public interest, it may not take any action that would be inconsistent with the judicially established "MCI's right to enter the market now" (*Execunet III*, Pet. App. 9b).

[15] *Slip Op.*, pp. 14, 15; Pet. App. 13a, 14a.

IV. THE "DECISION OF THE FEDERAL GOVERNMENT" USURPED AGENCY FUNCTIONS.

In reaching the result it desired, the court below not only usurped the FCC's substantive right and responsibility under its statute to determine whether the public interest requires authorizations and carrier interconnections, but the court also without warrant undertook to prescribe the procedures that the agency must follow, an intrusion consistently condemned by the Court.[16] Moreover, in excluding from its own consideration, as well as the Commission's, the interconnection hearing and public interest finding procedure prescribed by the Commission's statute, the court leaves itself without foundation in law for its interconnection order. Inasmuch as there is no common law obligation on the part of a carrier to interconnect its facilities with those of another carrier,[17] the interconnection obligation is purely a matter of statute. Thus the court's nullification of the statute (Communications Act, Sec. 201(a))[18] as a method by which FCC may proceed also eliminates the only basis for the obligation.

In sum, we have in this case court-ordered long distance telephone service competition. We have court-ordered interconnection. And we have both without the semblance of an FCC public interest finding, and indeed in complete opposition to the findings and conclusions reached by the Commission, its reading of its

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[16] See, *e.g.*, *Vermont Yankee, supra; F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940).

[17] *Atchison, Topeka & S.F.R.R. Co.* v. *Denver N.O.R.R. Co.*, 110 U.S. 667 (1884); *Louisville & Nashville R.R. Co.* v. *West Coast Co.*, 198 U.S. 483 (1904).

[18] 47 U.S.C. 201(a); Pet. App. 1f.

own orders, and its understanding of decisions from other circuits.

Additionally, we have a court-discovered and directed exclusive procedure which it said the FCC should have followed to properly (in the court's view) accomplish what the FCC intended to do and in good faith believed it had done, together with further court-prescribed procedures by which and only by which the Commission may now undertake to rectify its newly court-discovered mistake. Meanwhile, court-ordered authorization and court-ordered interconnection must be permitted to continue and expand.

V. THE BRIEFS IN OPPOSITION AVOID THE ISSUE.

In the face of these clearly unwarranted judicial usurpations of administrative functions by the court below and their effects, what do the MCI and SPCC briefs in opposition have to say on the point?

SPCC devotes but one conclusionary sentence to the Vermont Yankee [19] issue. The court below was not unhappy with the result reached by FCC, says SPCC, but merely sought to achieve the intended effect of the result it decreed.[20] This simply begs the question, for the court's usurpation of administrative functions permeates *Execunet I* as now construed in *Execunet II*.

The MCI brief does devote two pages and six lines to the point, but most of this space is occupied by a lengthy quotation from *Execunet III* and an even

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[19] *Vermont Yankee Nuclear Power Corp.* v. *National Resources Defense Council, Inc., supra.*

[20] SPCC Brief in Opposition, pp. 15-16.

longer footnote reference to pending Federal legislation styled "Communications Act of 1978." [21]

The quotation from *Execunet III* does not help MCI or the court below. Rather, it is an excellent illustration of the degree to which judicial usurpation of agency authority took place below. For while the court in *Execunet III* expressed "complete agreement" with USITA's emphasis on *Commission—not court—responsibility* for determining whether competition in long distance telephone service is in the public interest, it cavalierly dismisses the Commission's belief that it must affirmatively find competition (and interconnection) to be in the public interest *before* authorizing competition or ordering interconnection, characterizing the Commission's position as "reflect[ing] only the Commission's interpretation of the statutory provisions of the Communications Act and of earlier decisions rendered by the Commission, the Third Circuit, and, most importantly, this court in *Execunet I*." [22]

That this had been the Commission's consistent interpretation over many years of its statute, its decisions, and the Third Circuit decisions (including the Third Circuit decision deferring to the Commission on the question of the scope of the competition FCC had

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[21] MCI Brief in Opposition, pp. 25-26. MCI's characterization (n.54) of the proposed Sec. 331 of the pending bill as "a ringing declaration that sound public policy requires maximum reliance on competition in telecommunications" is quite helpful, for where the Congress finds new legislation necessary to establish this policy, clearly the existing Communications Act of 1934 does not establish it; and it is under the existing statute and the Court's reading of that statute that the Commission must act.

[22] *Execunet III*, Pet. App. 8b-9b.

authorized)[23] is ignored by the court below in stressing the preeminence and overriding importance of its own *Execunet I* decision. What the court also continued to overlook, however, is the fact that the Commission's interpretation of its statute and its decisions were in complete harmony with the Court's interpretation in *F.C.C.* v. *RCA Communications, Inc.*, 346 U.S. 86, 93 (1953)—

> "The Act by its terms *prohibits competition by those whose entry* does not satisfy the public interest standard." (Emphasis supplied)

Despite this clear and explicit holding, however, the court below marches to a different beat, one which sounds in the negative, *i.e.*, entry must be allowed now without a public interest finding, and the Commission may require *exit* only when and where it finds competition *not* in the public interest.

CONCLUSION

As demonstrated herein, in USITA's petition in No. 78-216, in the AT&T petition in No. 78-217, and in the F.C.C. petition in No. 78-270, the court below has clearly and drastically exceeded the bounds of judicial review, usurped the functions of the F.C.C., and by mandating continued and expanded interconnected competition in long distance telephone service "until it [is] found that the public interest demand[s] otherwise,"[24] the court below has removed any doubt that may have existed that its decisions are ripe for review on certiorari.

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[23] *MCI* v. *AT&T*, *supra*.

[24] *Execunet II*, Slip Op., p. 15, Pet. App. 14a.

The petitions should be granted.

Respectfully submitted,

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